



POLICE DEPARTMENT

-----X
In the Matter of the Disciplinary Proceedings :

- against - :

FINAL

Police Officer Kim Morgan :

ORDER

Tax Registry No. 885492 :

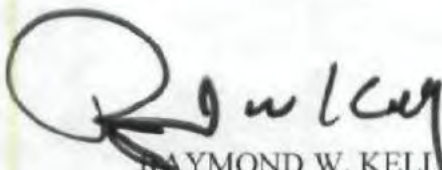
OF

Military and Extended Leave Desk :

DISMISSAL
-----X

Police Officer Kim Morgan, Tax Registry No. 885492, Shield No. 30675, Social Security No. ending in [REDACTED] having been served with written notice, has been tried on written Charges and Specifications numbered 86122/10 as set forth on form P.D. 468-121, dated February 1, 2010, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Kim Morgan from the Police Service of the City of New York.


RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE: On July 19, 2011 @ 0001HRS

COURTESY • PROFESSIONALISM • RESPECT



POLICE DEPARTMENT

March 7, 2011

-----X
In the Matter of the Charges and Specifications

: Case No. 86122/10

- against -

:

Police Officer Kim Morgan

:

Tax Registry No. 885492

:

Military and Extended Leave Desk

:

-----X
At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPEARANCE:

For the Department:

David Green, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent:

Craig Hayes, Esq.
Worth, Longworth & London, LLP
111 John Street, Suite 640
New York, NY 10038

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

COURTESY • PROFESSIONALISM • RESPECT

POLICE OFFICER KIM MORGAN

The above-named member of the Department appeared before me on October 7, 2010, November 4, 2010, and January 28, 2011, charged with the following

1 Said Police Officer Kim Morgan, assigned to 40th Precinct, on or about and between October 18, 2009 and January 18, 2010, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer, without authority or police necessity, did possess a controlled substance, to wit, cocaine

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT - PROHIBITED
CONDUCT – GENERAL REGULATIONS

2 Said Police Officer Kim Morgan, assigned to 40th Precinct, on or about and between October 18, 2009 and January 18, 2010, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Police Officer, without authority or police necessity, did ingest a controlled substance, to wit, cocaine

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT - PROHIBITED
CONDUCT – GENERAL REGULATIONS

The Respondent, through her counsel, entered a plea of Not Guilty to the subject charges and a stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review

DECISION

The Respondent is found Guilty as charged

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Police Officer Manuela Davis, Sergeant Ern Hughes and Dr Thomas Cairns as witnesses

POLICE OFFICER KIM MORGAN

Police Officer Manuela Davis

Police Officer Davis testified that she is a 20-year member assigned to the Medical Division's Drug Screening Unit. She collects hair samples from members who have been ordered to report to the Medical Division for drug testing. She has received training from the Department and from Psychomedics Corporation (Psychomedics), the drug testing laboratory the Department utilizes for hair sample testing, regarding how to properly collect and seal hair samples for drug testing. She estimated that every week she collects hair samples from 30 to 40 members of the service (MOS). She collects three hair samples from each MOS.

Davis specifically recalled collecting hair samples from the Respondent on January 18, 2010, because they had engaged in an informal conversation about their retirement plans. The Respondent appeared at the Medical Division's Drug Screening Unit because her name was on the computer-generated list of members who were ordered to report to the Medical Division for random drug screening that day.

After the Respondent signed the Medical Division's log, Davis followed the mandated hair sample collection documentation procedures by assigning the Respondent drug screening number 2-191-10-XH. The letter "H" in this drug screening number indicated that hair samples would be taken from the Respondent.

This drug screening number was entered on a "Drug Screening Questionnaire - Hair Testing" form [Department's Exhibit (DX) 1]. The Respondent entered her name, shield number, tax number, and social security number on this form. Section "1" of this form required the Respondent to "list any prescription medication taken during the past 3 months." The Respondent wrote "p [REDACTED]

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██████████" The Respondent signed and dated the form and Davis signed it as the "collector" The Respondent's index finger was inked and her fingerprint was entered on this form

The Respondent's drug screening number was also entered on three "Forensic Drug Test Custody and Control" forms (DX 3) These three identical forms each contained a pre-printed "Specimen ID" number M384998, M389309 and M874258 (DX 9) The Respondent signed and dated each of the forms and Davis signed both forms as the "collector"

Davis then followed the mandated hair sample collection procedures by bringing the Respondent into a room containing two tables Davis cleaned the sample collection table with "cadiwipes" to disinfect it and by putting clean paper on top of the table She then used sample collection packaging materials provided by Psychemedics She set-up on the table three strips of tin foil and three collection envelopes and three sample labels all of which she removed from a standard sealed kit provided by Psychemedics Davis put on sterile gloves and removed a scissor from a sealed package provided by Psychemedics

Davis testified that she cut hair from the nape of the Respondent's neck because her hair was in braids She separated the hair into three piles Each pile was placed into one of the three packets of tin foil and each packet of tin foil was folded and then placed into one of the three sample collection envelopes which were each sealed along with a Sample Acquisition Card (DX 4-6) denoting the Specimen ID number which Davis signed in the Respondent's presence and then had the Respondent initial

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The three samples were then placed inside a locker which was the locked Samples M384998 and M389309 were later mailed to Psychomedics for testing The third sample, Sample M874258, was retained inside the locker for the Respondent's later use

On cross-examination, Davis testified that she always attempts to obtain hair samples from head hair but that she was not able to do this because the Respondent's hair was pulled back or braided Davis testified that because she is allergic to latex, she uses non-latex rubber gloves when collecting hair samples

Sergeant Erin Hughes

Sergeant Hughes testified that she is an 11-year member assigned to the Medical Division's Drug Screening Unit who supervises the Medical Division's drug testing staff Hughes recalled that on August 3, 2010, after the Respondent had been notified that she had failed her January 18, 2010, random drug screening test, the Respondent came into the Medical Division's Drug Screening Unit and requested that her third sample, Sample M874258, be tested The Respondent handed over a money order for \$110.00 made out to Quest Diagnostics Incorporated (Quest) After verifying that the Respondent was Police Officer Kim Morgan, Hughes requested that Lieutenant Mastrande unlock the sample storage locker Hughes then had the Respondent verify her initials on the Custody and Control form for the third sample, Sample M874258 (DX 6) Hughes then placed Sample M874258 into an envelope which she sealed and had the Respondent initial next to the date August 3, 2010 Hughes packed the sealed sample into a FedEx box, along with the money order for \$110.00, and explained to the Respondent that the

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sample would be mailed to Quest via FedEx. The FedEx box was placed into a locked locker at the sick desk that only the sick desk supervisor is able to access.

On cross-examination, Hughes testified that no other samples were placed inside the envelope that contained Sample M874258 and that no other samples were mailed that day. Hughes testified that the Respondent chose Quest as the lab that would analyze her third sample.

Dr. Thomas Cairns

Dr. Cairns, who is presently Senior Science Advisor, and formerly Vice President and Lab Director, for Psychemedics, a drug testing laboratory in Culver City, California, was stipulated to be an expert in the area of testing hair for drugs based on the qualifications cited in his curriculum vitae (DX 7). Cairns explained that when cocaine enters the body by ingestion, whether it is snorted, smoked or eaten, it enters the blood stream and as blood enters hair follicles it carries some of the ingested cocaine with it. Cocaine and benzoylecgonine (BE), the principal cocaine metabolite that is produced in the body when cocaine is ingested and metabolized, are "trapped" inside hair follicles. Cairns further explained that since hair grows at a predictable rate, generally one half inch per month, hair acts as a "time recorder" as to when cocaine was ingested.

Cairns testified that since the hair that was clipped from the nape of the Respondent's neck was 3.9 cm, or about one-and-one-half inches long, the Respondent's hair samples had about a 90-day "look back" period, meaning that analysis of the Respondent's hair samples would only detect cocaine that was ingested within 90 days prior to the date that the samples were collected. Cairns further testified that since it can

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take four to seven days for hair that is growing on the nape of the neck to grow long enough to be able to be cut off at skin level, the Respondent's hair samples would not reflect any cocaine that she ingested up to seven days immediately prior to the date that her hair samples were collected

Cairns interpreted the data contained in the laboratory data package produced by Psychemedics which details the analytical results of the testing of the Respondent's hair samples (DX 8). He testified that the analytical results show that only one of the Respondent's two hair samples was initially tested and it tested positive for cocaine when subjected to the Radio Immunoassay screening test (RIA). As a result, following laboratory protocol, both of the Respondent's hair samples were then separately tested via GC/MS instrumentation. The GC/MS test results showed that both samples tested positive for cocaine at a concentration level well above the administrative reporting cut-off level of five nanograms of cocaine per ten milligrams of hair. Sample M384998 tested positive at 20.9 nanograms of cocaine per ten milligrams of hair. Sample M389309 tested positive at 12.5 nanograms of cocaine per ten milligrams of hair.

Cairns further testified that the GC/MS analytical results show that both of the Respondent's hair samples also tested positive for the presence of BE. Sample M384998 tested positive for BE at 2.8 nanograms of BE per ten milligrams of hair, and Sample M389309 also tested positive for BE at 1.8 nanograms of BE per ten milligrams of hair. Cairns opined that the GC/MS analytical results reflected multiple ingestions of cocaine by the Respondent during the three-month period preceding one week prior to the date of collection.

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Cairns also testified that none of the prescription medications that the Respondent listed on the "Drug Screening Questionnaire - Hair Testing" form she completed (DX 1) that she had taken during the preceding three months could have caused her hair to test positive for cocaine or BE

Cairns also interpreted the data contained in the laboratory data package produced by Quest laboratory (DX 9) which details the analytical results of the testing of the Respondent's third hair sample, Sample M874258, which had been retained in the locker at the Medical Division for the Respondent's use. He testified that the Quest analytical results showed that the Respondent's third hair sample tested positive for cocaine at a concentration level of 4.7 nanograms of cocaine per ten milligrams of hair. He further testified that the Quest analytical results showed that the Respondent's third hair sample also tested positive for BE at a concentration level of 1.2 nanograms of per ten milligrams of hair. He testified that Quest normally uses an administrative reporting cut-off level of three nanograms per ten milligrams of hair but that no cut-off level was used by Quest in reporting the results of their testing of the Respondent's third hair sample.

On cross-examination, Cairns testified that because ingested cocaine is quickly flushed out of the urinary tract, a urine sample that is tested for the presence of BE has a maximum 72-hour "look back" period depending on the amount of urine dilution that has occurred as a result of the consumption of liquids. Thus, GC/MS analysis can only detect BE in a urine sample if cocaine was ingested within 72 hours of the point in time that the urine sample was collected. Cairns confirmed that he did not personally perform any of the tests on the Respondent's hair samples and that 18 to 20 trained technicians employed by Psychomedics performed these tests.

POLICE OFFICER KIM MORGANThe Respondent's Case

The Respondent called John Fitzgerald as witness and testified in her own behalf

John Fitzgerald

Fitzgerald, who attained the rank of sergeant before he retired from the Nassau County Police Department after 30 years of service and whose last assignment was to that Department's Internal Affairs Bureau, testified that he has been a private investigator for the past eight years. He is a trained polygraphist, having graduated from the Backster School of Lie Detection, who is a member of the American Polygraph Association (APA) and the American Association of Police Polygraphists (AAPP). He attends the AAPP seminar each year to keep abreast of the latest techniques in the field. He has been certified as an administrator of polygraph examinations by the APA. He has administered about 3,000 polygraph examinations. Based on his qualifications, he was deemed to be an expert in administration of polygraph examinations.

Fitzgerald recalled that he was paid \$750 to conduct a polygraph examination of the Respondent on December 17, 2010. After testing the accuracy of his Lafayette polygraph instrument, Fitzgerald conducted his polygraph examination of the Respondent by asking her the same ten questions three separate times for a total of 30 questions. These ten questions included "irrelevant, relevant and control" questions. The two "relevant" questions he asked were "Have you ever knowingly and intentionally ingested cocaine?" and "Have you ever knowingly and intentionally possessed cocaine?" The Respondent answered "no" to both of these questions.

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Fitzgerald prepared a Polygraph Test Report (RX A) in which he wrote that the Respondent was cooperative during his polygraph testing and that based on his interpretation of the graph data produced by his polygraph instrument (RX B), he found the Respondent to be truthful when she denied that she had ever knowingly and intentionally possessed or ingested cocaine

On cross-examination, Fitzgerald testified that he was aware that the Respondent was taking prescription medications but he did not know whether these medications impacted her behavior during her polygraph test. Fitzgerald confirmed that he asked the Respondent a "control question," number six, "If it serves your purpose, do you lie to get out of trouble?" The Respondent answered "no" to this question. Fitzgerald agreed that based on the data produced by his polygraph instrument (RX B), he determined that the Respondent's "no" answer to this question was a lie.

The Respondent

The Respondent testified that she has never possessed or ingested cocaine or any other illegal drug and that she has no idea how her hair samples could have tested positive for the presence of cocaine.

On cross-examination, she agreed that Davis had collected her hair samples in the manner that Davis described in her testimony at this trial. She also agreed that when she came into the Medical Division to arrange to have her third hair sample sent for testing, that Hughes had followed the procedures that Hughes had described during her testimony at this trial.

FINDINGS AND ANALYSISRandom drug screening selection and hair sample collection and testing procedures

The Respondent does not challenge the computer software program that generated her name on a list of members who were to be ordered to report to the Medical Division for random drug screening. This computer program has been found to satisfy the requirement of randomness sufficient to justify a drug testing order¹ The Respondent also does not contest that her hair samples were properly collected, packaged, sealed and transported to Psychemedics for testing

Neither does the Respondent challenge the accuracy of the results produced by the screening test that is utilized by Psychemedics to initially analyze hair samples for the presence of cocaine, or the GC/MS instrumentation that is utilized by Psychemedics to confirm the presence of cocaine in samples which have tested positive during the screening test and to quantify the concentration levels in the samples of cocaine and benzoylecgonine (BE), the principal cocaine metabolite that is produced in the body when cocaine is ingested and metabolized

Cairns, former Laboratory Director and Scientific Director for Psychemedics, was stipulated to be an expert in the field of testing hair for drug content based on the qualifications listed in his curriculum vitae (DX 7) Cairns explained and interpreted the data contained in the laboratory data package produced by Psychemedics which details the analytical results of the testing of the Respondent's hair samples (DX 8) Although Cairns did not personally conduct any of these tests, due process does not require that the 18 to 20 technicians who, Cairns testified, performed these tests testify at the disciplinary

¹ Worrel v. Brown, 177 A D 2d 446 (1st Dept 1991), leave to appeal denied, 79 N Y 2d 755 (1992)

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hearing because testing results may be admitted and credited based on the testimony of the former laboratory director where, as here, the reliability of the testing procedure used has been established, the former director is familiar with all the steps taken, the former director is subjected to cross-examination and no claim is raised that there was a specific defect in the testing procedures² The Respondent does not allege any specific defect in the testing procedures utilized by Psychemedics

Cairns testified that the testing data shows that after one of the Respondent's hair samples tested positive for cocaine via a scientifically recognized screening method, both of the Respondent's hair samples were separately subjected to testing utilizing the scientifically recognized GC/MS method He explained that the analytical results show that when both of the Respondent's hair samples were individually tested via GC/MS instrumentation, both samples tested positive for cocaine at a concentration level well above the administrative cut-off level of five nanograms of cocaine per ten milligrams of hair Specifically, Sample M384998 tested positive at 20.9 nanograms of cocaine per ten milligrams of hair, and Sample M389309 tested positive at 12.5 nanograms of cocaine per ten milligrams of hair

Moreover, Cairns testified that the GC/MS analytical results show that both of the Respondent's hair samples also tested positive for the presence of BE Sample M384998 tested positive for BE at 2.8 nanograms of BE per ten milligrams of hair, and Sample M389309 also tested positive for BE at 1.8 nanograms of BE per ten milligrams of hair Since BE is produced only when cocaine is ingested, Cairns opined that the GC/MS analytical results reflected that the Respondent ingested cocaine on multiple occasions

² Gordon v. Brown, 84 N.Y.2d 574, 579-580 (1994)

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during the three-month period which preceded the seven-day period prior to the date of collection

Where, as here, a recognized screening test positive result is confirmed when the same sample is subjected to GC/MS analysis, such testing results have been found to constitute substantial scientific evidence of the presence of cocaine.³ Moreover, here, the analytical results produced by Psychemedics are corroborated by the testing results produced by the laboratory the Respondent selected to test her third hair sample, Sample M874258 (DX 9 p 5), which had been retained in the locker at the Medical Division for the Respondent's use. Cairns offered expert testimony that the Quest analytical results show that the Respondent's third hair sample tested positive for cocaine at a concentration level of 4.7 nanograms of cocaine per ten milligrams of hair and also tested positive for BE at a concentration level of 1.2 nanograms of per ten milligrams of hair (DX 9 p 87). Based on the above, the test results regarding all three of the Respondent's hair samples constitute substantial evidence that the Respondent possessed and ingested cocaine⁴ between October 18, 2009 and January 11, 2010.⁵

Affirmative defense of involuntary and unknowing ingestion

Although the Respondent raised an affirmative defense of involuntary ingestion by contending that her positive test results were the result of unknowing ingestion of

³ McBride v. Kelly, 215 A.D.2d 161 (1st Dept 1995)

⁴ McGovern v. Safir, 266 A.D.2d 107 (1st Dept 1999)

⁵ Although the charges cite to January 18, 2010 (the day the Respondent's hair samples were collected by Davis), Cairns testified that since it can take four to seven days for hair follicles on the nape of the neck to grow hair long enough for it to be cut off at skin level, the Respondent's hair samples would not reflect cocaine that she ingested up to seven days immediately preceding January 18, 2010.

POLICE OFFICER KIM MORGAN

cocaine, the Respondent testified that she has no idea how her hair samples could have tested positive for the presence of cocaine. Cairns testified that none of the prescription medications that the Respondent consumed during the three-month period preceding January 18, 2010, as listed on the "Drug Screening Questionnaire-Hair Testing" form she completed (DX 1), could have caused her hair samples to test positive for cocaine or BE. Thus, the record is devoid of any reason as to how the Respondent's hair samples could have tested positive for the presence of cocaine and BE other than that the Respondent obtained and knowingly ingested cocaine.

The only evidence the Respondent offered to attempt to meet her burden of persuasion regarding the affirmative defense of involuntary and unknowing ingestion⁶ was the testimony of Fitzgerald regarding the polygraph examination of the Respondent that he conducted on December 17, 2010.

Although the results of polygraph examinations are generally inadmissible at criminal trials because of a lack of general scientific recognition of the polygraph's efficacy,⁷ the results of polygraph examinations have been properly admitted at police disciplinary proceedings where, as here, the reliability of the instrument (RX B) and the qualifications of the test administrator have been established.⁸

With regard to Fitzgerald's polygraph examination of the Respondent, Fitzgerald admitted that he did not know whether the various prescription medications the Respondent was taking impacted her behavior during the polygraph examination, and Fitzgerald confirmed that the Respondent lied during the polygraph examination when

⁶ Green v. Sielaff, 198 A.D.2d 113 (1st Dept. 1993).

⁷ See People v. Forte, 279 N.Y. 204, Sowa v. Nassau County PD, 23 N.Y. 329.

⁸ See May v. Shaw, 79 A.D.2d 970 (2nd Dept. 1981).

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she answered “no” to the “control” question, “If it serves your purpose, do you lie to get out of trouble?”

The question presented is whether Fitzgerald’s polygraph finding that the Respondent truthfully denied that she had ever knowingly and intentionally ingested or possessed cocaine, standing alone, is sufficient to meet the Respondent’s burden of persuasion regarding establishing an affirmative defense of involuntary and unknowing ingestion

I find that Fitzgerald’s opinion that the Respondent was truthful when she denied that she had ever ingested or possessed cocaine does not trump the expert testimony of Cairns that unknowing ingestion could not have produced the cocaine and BE levels detected in the Respondent’s hair samples⁹ and that the testing results regarding the Respondent’s hair samples are consistent with multiple ingestions of cocaine by the Respondent during the three-month period that preceded the week that her hair samples were collected

As a result, I find that the Respondent did not meet her burden of persuasion

Conclusion

Based on this record, the only conclusion that can be reached is that the Respondent possessed and ingested cocaine between October 18, 2009 and January 11, 2010

The Respondent is found Guilty

⁹ See Chiofalo v Kelly, 70 A.D. 3d 423 (1st Dept 2010), Conner v NYPD, 22 A.D. 3d 425 (1st Dept 2005)

POLICE OFFICER KIM MORGAN

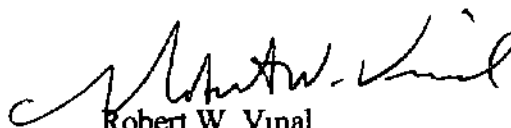
PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined See Matter of Pell v Board of Education, 34 N Y 2d 222 (1974)

The Respondent was appointed to the Department on January 21, 1985
Information from her personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum

Although the Respondent has served 26 years as a uniformed member of the service, and although her only other formal disciplinary adjudication occurred in 1987, the Respondent has violated the Department's rule against using illegal drugs As a result, I am left with no alternative but to recommend that she be DISMISSED from the New York City Police Department

Respectfully submitted,



Robert W Vinal

Assistant Deputy Commissioner - Trials

APPROVED

JUL 19 2011

RAYMOND W KELLY
POLICE COMMISSIONER

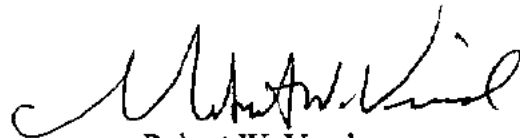
POLICE DEPARTMENT
CITY OF NEW YORK

From Assistant Deputy Commissioner - Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
POLICE OFFICER KIM MORGAN
TAX REGISTRY NO 885492
DISCIPLINARY CASE NO 86122/10

The Respondent received an overall rating of 4.5 on her 2009 evaluation, 4.0 on her 2008 evaluation, and 4.0 on her 2007 evaluation. She has been awarded two Excellent Police Duty medals [REDACTED]
[REDACTED]

She has a prior formal disciplinary record. In 1987, [REDACTED]
[REDACTED]

For your consideration



Robert W. Vinal
Assistant Deputy Commissioner – Trials